

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELIOTSE PEBION COBELL, et al.,	)	
Appellees,	)	No. 03-5063
	)	[consolidated with
v.	)	No. 03-5084 and
	)	No. 03-5097]
GAIL A. NORTON, as Secretary of	)	
the Interior, et al,	)	
Appellants	)	
	)	
	)	
	)	

FEDERAL GOVERNMENT'S REPLY IN SUPPORT OF  
MOTION FOR VOLUNTARY DISMISSAL OF CONSOLIDATED APPEALS

These appeals arise from district court orders that apply a fiduciary exception to the attorney-client and work product privileges. As described in our motion, these orders dealt with a specific discovery request but also purported to establish a framework for future rulings in a discovery regime to be supervised by the Special Master-Monitor Joseph S. Kieffer III. See 212 F.R.D. 48 (D.D.C. 2003) (responding to government objections to Mr. Kieffer's oversight and imposing sanctions for raising the objections). On April 24, 2003, this Court stayed Mr. Kieffer's appointments, and on July 18, 2003, the Court required his removal from the positions of Master and Monitor. See Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003). As we explained in our motion, with the removal of Mr. Kieffer, the circumstances that gave rise to the appeal no longer exist, and no further rulings regarding the "fiduciary exception" issued during a 40-day trial that concluded in July. Accordingly, the

government has moved to dismiss its appeals. As we noted in our motion, it is unclear whether new applications of the fiduciary exception will result in rulings that may warrant appellate review, and dismissal of the present appeals would be without prejudice to the government's right to challenge such future rulings, should they occur.

A. Plaintiffs assert that the Court should establish conditions on the dismissal. The Court, plaintiffs urge, should either dismiss with prejudice or indicate that future appeals may be barred on a law-of-the-case theory. Plaintiffs also ask for attorney's fees.<sup>1</sup> Plaintiffs offer no basis whatsoever for imposing conditions on the Court's order of dismissal.

Plaintiffs believe that no attorney-client or work-product rulings involving the so called "fiduciary exception" should be subject to appellate review prior to final judgment. As we explained in our opposition to plaintiffs' motion to dismiss,

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<sup>1</sup> Plaintiffs ask (Response at 3-4) that the dismissal be with prejudice or be dismissed on the following terms:

1) the right of Plaintiffs-Appellees to assert, and the application of, the "law of the case" doctrine as a bar to any future challenge by the government to the fiduciary exception to the attorney-client privilege or attorney work product privilege, shall not be impeded nor be affected by the withdrawal of the appeal; and 2) Plaintiffs-Appellees costs and reasonable fees for preparation of appeal responses are to be paid by Trustee-Delegates.

that position is incorrect. See United States v. Philip Morris, Inc., 314 F.3d 612 (D.C. Cir. 2003).

What should be beyond controversy, however, is that a decision not to seek review of one attorney-client ruling does not impair a party's ability to seek review of a later ruling involving a claim of privilege as to different documents or questions. Plaintiffs present no reason or authority to support their contention that the government must proceed with the present appeals or prejudice its ability to challenge later privilege rulings.

Indeed, plaintiffs' present position that the government must seek appellate review now, if at all, is in stark contrast with the position that plaintiffs took in their motion to dismiss the appeals. In that motion, plaintiffs argued that, unlike in Philip Morris, the rulings from which the government appealed in this case did not conclusively resolve a privilege issue:

[T]he District Court's challenged orders in this case generally provide only prospective guidance to the parties regarding privilege issues not yet fully developed or ripe for decision. Moreover, even as to the single deposition question the District Court ordered to be answered over the Trustee Delegate's objection, the record does not disclose any subsequent effort to enforce the December 23 order or to reschedule Mr. Cason's deposition so that the disputed question could be re-asked. Thus, no showing of "conclusiveness" or "finality" has been made that would justify the interlocutory review that Trustee-Delegates improperly seek in this instance.

Plaintiffs' Motion to Dismiss at 5.

Plaintiffs' previous insistence that the district court had not conclusively resolved a claim of privilege and that the issues were thus "not yet fully developed or ripe for decision," cannot be squared with their current position that the government should incur prejudice from the voluntarily dismissal of the current appeals. If the appeal had been fully litigated and this Court had concluded that the privilege issue was not "ripe for decision," the result might be dismissal of the appeal, but not a ruling that would impair the government's ability to seek review of a later order. The voluntarily dismissal of the appeals should have no greater consequences.

B. Plaintiffs' request for attorney's fees is unfounded. Plaintiffs cite Circuit Rule 38, authorizing fees when an appeal is taken "to harass or to cause unnecessary delay." Response at 56. Plaintiffs offer no reason or authority to demonstrate that this standard is satisfied, even assuming that the rule would allow fees against the federal government. The government filed notices of appeal and is now moving to dismiss those notices before briefing. The government did not seek a stay of any district court ruling or in any way seek to delay the progress of the case based on the notices of appeal. The filing of the notices of appeal caused no delay and plaintiffs identify none. Filing such notices cannot plausibly be characterized as "harassment."

C. Plaintiffs urge that the Court should rule on their motion to dismiss the government's appeals for lack of jurisdiction. If the Court grants the government's motion to dismiss its appeals voluntarily, it cannot properly reach the issues presented in plaintiffs' motion. And, if the Court does not grant the government's motion, the issue of jurisdiction will properly be resolved upon completion of briefing.

D. Plaintiffs dispute the importance of former Master-Monitor Joseph Kieffer's role to the government's concerns regarding application of the attorney-client privilege. Even if plaintiffs' contentions were correct, they would not support the conditions they seek to impose upon the dismissal of the government's appeals. In fact, Mr. Kieffer was charged with overseeing discovery and with propounding his own document requests. See 212 F.R.D. 48, 57-60 (D.D.C. 2003). This Court has catalogued in some detail the extraordinary role assigned to Mr. Kieffer by the district court. See Cobell v. Norton, 334 F.3d 1129, 1142 (D.C. Cir. 2003).

Plaintiffs note that the government agreed to Mr. Kieffer's initial appointment as a Monitor, and assert that Mr. Kieffer was properly reappointed over the government's objections. Response at 5. This Court, however, flatly rejected that argument. See id. at 1141 ("The plaintiffs' suggestion that [the consent order], which explicitly grants the parties the right to object

to Kieffer's reappointment, actually served as consent to his unlimited tenure, is absurd.").

E. For the reasons set out above and in our motion, the Court should grant the government's motion to dismiss without conditions. However, if the Court were to conclude that the government can dismiss its appeals only by prejudicing its ability to seek review of future district court orders, the government would have no choice but to proceed with its appeals. In that event, our motion should be denied and the present appeals should go forward.<sup>2</sup>

Under the briefing schedule established by this Court, the government's opening brief would be due on September 9, 2003. Accordingly, we respectfully ask that the Court act on our motion to dismiss at the earliest possible time. Together with this motion, we are filing a conditional motion for an extension of time in which to file our opening brief in the event that the Court concludes that it can dismiss only upon the conditions proposed by plaintiffs.

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<sup>2</sup> Alternatively, the government would, in that case, ask to withdraw its motion and proceed with the appeals.

CONCLUSION

For the foregoing reasons and those stated in our motion,  
the government's appeals should be dismissed.

Respectfully submitted,

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AUGUST 2003

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2003, I caused copies of the foregoing motion to be sent to the Court and to the following counsel by hand delivery:

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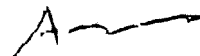
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